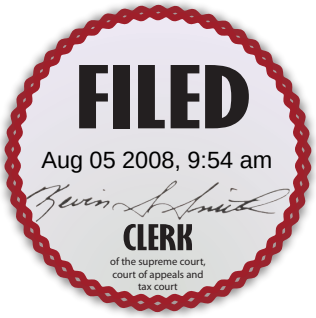

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT W. THOMPSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 42A01-0804-CR-184
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KNOX SUPERIOR COURT
The Honorable W. Timothy Crowley, Judge
Cause No. 42D01-0405-FA-103

August 5, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Robert W. Thompson appeals his sentence for three counts of child molesting as class C felonies. Thompson raises one issue, which we revise and restate as whether Thompson's sentence is inappropriate in light of the nature of the offense and the character of the offender. We affirm in part, reverse in part, and remand.

The relevant facts follow. Thompson knew N.M., D.R., and J.R., through his involvement with a little league baseball program. In the summer of 1994, Thompson fondled N.M., who was less than fourteen years old, by touching N.M.'s penis with his hand. Thompson also fondled D.R., who was "about 13, 14" years old. Transcript at 14. In 1998, Thompson fondled J.R., who was under the age of fourteen years.

On May 5, 2004, the State charged Thompson with three counts of child molesting as class A felonies and four counts of child molesting as class C felonies. On June 15, 2007, Thompson pled guilty to three counts of child molesting as class C felonies, and the State dismissed the remaining charges. The State agreed to recommend that Thompson be sentenced to a total maximum executed sentence of five years in the Indiana Department of Correction. Thompson and the State agreed "that the Court shall be free to impose any lawful sentence and suspend that portion which exceed[s] the maximum agreed executed sentence of five (5) years." Appellant's Appendix at 55.

At the sentencing hearing, the trial court noted Thompson's service in Vietnam and his lack of criminal history. The trial court also noted the seriousness and nature and circumstances of the offenses and that each of the offenses involved a different child. The trial court classified the risk that Thompson would commit another crime as a

"moderate risk." Transcript at 59. The trial court also stated that Thompson would receive medical attention while he was in the Department of Correction and recognized the financial impact on Thompson's wife. The trial court stated, "I find no aggravating factors here, but I also find no mitigating factors. And after considering the balance the Court determines that the aggravating and mitigating factors are in balance because the aggravating are in balance with mitigating." Id. at 61.

The trial court sentenced Thompson to four years on one count, four years with three years suspended to supervised probation on a second count, and four years with the entire sentence suspended to probation on the last count of child molesting as a Class C felony to be served in the Department of Correction. The trial court ordered that the sentences be served consecutively for a total executed sentence of five years.

The sole issue is whether Thompson's sentence is inappropriate in light of the nature of the offense and the character of the offender. Thompson argues that this court should revise his sentence "to be served in community corrections rather than in the Indiana Department of Corrections [sic]."[1] Appellant's Brief at 6. The Indiana Supreme Court has held that a trial court's decision as to placement, or where a sentence is to be

[1] Thompson also appears to argue that the trial court failed to find the following mitigators: (1) he pled guilty; (2) his lack of criminal history; (3) his military service; (4) imprisonment would result in undue hardship on himself; and (5) imprisonment would result in undue hardship on his wife. However, Thompson does not argue that he should have received a lesser sentence, but argues only that his sentence is inappropriate because the mitigating circumstances "justify a sentence in community corrections rather than the Indiana Department of Corrections [sic]." Appellant's Brief at 7. Thus, we focus our analysis on whether Thompson's sentence is inappropriate to the extent that he was sentenced to the Department of Correction, rather than a community corrections program.

served, is reviewable on appeal under Ind. Appellate Rule 7(B). See Biddinger v. State, 868 N.E.2d 407, 414 (Ind. 2007) (citing Hole v. State, 851 N.E.2d 302, 304 n.4 (Ind. 2006)). Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Thompson fondled three boys he met through a little league baseball program. Our review of the character of the offender reveals that Thompson pled guilty more than three years after the charges were filed. We also note that in exchange for Thompson's guilty plea, the State agreed to recommend that Thompson be sentenced to a total maximum executed sentence of five years in the Indiana Department of Correction. The State also dismissed three counts of child molesting as class A felonies and one count of child molesting as a class C felony. Thompson does not have a prior criminal history. Thompson went to Vietnam in September 1969, and lost the bottom part of his left leg, the calf on the back of his right leg, and "[h]is fingers were blown off" due to a mine explosion. Transcript at 30.

To the extent Thompson argues that his sentence is inappropriate because imprisonment would result in an undue hardship on him because of his health problems,[2]

we note that the record does not indicate that his condition requires constant medical attention. The trial court stated that "[t]he Department of Corrections [sic] will place him in the facility that they think is the most appropriate to his needs and circumstances. He will receive medical treatment while he's in DOC." Id. at 63. To the extent that Thompson argues that his wife would suffer hardship due to his imprisonment, we note that she receives her own disability check and that she took care of Thompson some of the time.

After due consideration of the trial court's decision, we cannot say that the trial court's placement of Thompson in the Department of Correction instead of community corrections is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Biddinger, 868 N.E.2d at 414 (holding that the defendant did not carry his burden of persuading the Indiana Supreme Court that the location of his sentence was inappropriate based upon his character and the nature of the offense he committed).

While Thompson did not challenge the fact that the trial court ordered consecutive sentences, we note that it is our duty to correct sentencing errors, sua sponte, if necessary. Comer v. State, 839 N.E.2d 721, 726 (Ind. Ct. App. 2005), trans. denied. See, e.g., Logan v. State, 729 N.E.2d 125, 136 (Ind. 2000) (addressing the trial court's error in

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[2] In July 2007, Thompson elected to amputate a portion of his leg above his knee due to an increasing amount of pain and was enrolled in ongoing gait training.

sentencing defendant sua sponte); Jordan v. State, 510 N.E.2d 655, 659-660 (Ind. 1987) ("The State argues that since [defendant] did not raise the issue on appeal, it has been waived. However, we view this as fundamental error as it renders the evidence insufficient to support the determination of habitual offender and hereby raise it sua sponte."); see also Jones v. State, 775 N.E.2d 322, 331 (Ind. Ct. App. 2002) (holding that although defendant's argument inadequately attacked the factual basis relied on by the trial court to impose consecutive sentences, we will nonetheless review the legality of the trial court's sentencing order).

Here, the trial court ordered consecutive sentences even though it found that there were "no aggravating factors" and at the same time that "the aggravating and mitigating factors are in balance." Transcript at 61. Because the trial court explicitly found that there were "no aggravating factors" and that "the aggravating and mitigating factors are in balance," we conclude that the trial court abused its discretion by ordering consecutive sentences. Id. See Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000) ("because the trial court found the aggravating and mitigating circumstances to be in balance, there is no basis on which to impose consecutive terms"), reh'g denied; Taylor v. State, 442 N.E.2d 1087, 1092 (Ind. 1982) (holding that trial court erred by imposing consecutive sentences when the trial court specifically found no aggravating circumstances). Thus, we remand with instructions to impose concurrent sentences. See Wentz v. State, 766 N.E.2d 351, 359 (Ind. 2002) ("As in Marcum, the imposition of consecutive sentences here, where the trial court twice stated the mitigating and aggravating factors were in balance, was

inappropriate. On this point, we remand to the trial court with instructions to impose concurrent sentences for all counts."), reh'g denied; Taylor, 442 N.E.2d at 1092 (remanding to order imposition of concurrent sentences).

For the foregoing reasons, we affirm the trial court's placement of Thompson in the Department of Correction and remand to revise Thompson's sentences to run concurrently.

Affirmed in part, reversed in part, and remanded.

DARDEN, J. and NAJAM, J. concur